Supreme Court, U.S.
FILED
96 588 OCT 15 1996
No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

THE WASHINGTON TIMES CORPORATION,

Petitioner,

v.

JULIE BERMAN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

ANITA BARONDES*
RONALD A. LINDSAY

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
815 Connecticut Ave., N.W.
Suite 500
Washington, D.C. 20006-4004
(202) 463-2400

Attorneys for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

63 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a civil jury trial, egregiously improper closing argument by counsel, including prejudicial reference to matters not in evidence and inflammatory rhetoric attributing malicious and grossly immoral conduct to the adverse party, requires a specific curative instruction.

2. Whether when a federal court case applying state law is pending on appeal, the federal court must be guided by that state's standards for determining retroactivity of a state court decision.

PARTIES

The parties to the proceedings before the United States Court of Appeals for the District of Columbia Circuit were The Washington Times Corporation and Julie Berman. The Washington Times Corporation is a wholly owned subsidiary of News World Communications, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES ii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 6

I. THE RULING OF THE COURT OF APPEALS ON THE EFFECTIVENESS OF GENERIC INSTRUCTIONS MADE BY THE TRIAL COURT IS IN CONFLICT WITH THE RULINGS OF OTHER FEDERAL COURTS OF APPEALS 6

II. THE COURT BELOW FAILED TO FOLLOW THE RULE USED BY OTHER FEDERAL COURTS OF APPEALS IN DETERMINING THE RETROACTIVITY OF A STATE COURT DECISION 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Allstate Ins. Co. v. James, 845 F.2d 315 (11th Cir. 1988) 12, 13

Ayoub v. Spencer, 550 F.2d 164 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977) 12

BMW v. Gore, 116 S. Ct. 1589 (1996) 4

Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 15

Chevron Oil Co. v. Huson, 404 U.S. 97 (1977) 17, 18

Demmer v. Patt, 788 F.2d 1387 (8th Cir. 1986) 16

Draper v. Airco, Inc., 580 F.2d 91 (3d Cir. 1978) 6

Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975) 6

Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 17

Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 (1993) 17

Izard v. United States, 946 F.2d 1492 (10th Cir. 1991) 16

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984) 13

McGowan v. Univ. of Scranton, 837 F.2d 1242 (3d Cir. 1988) 16

Miller v. County of Santa Cruz, 39 F.3d 1030 (9th Cir. 1994) 16

Nakajima v. General Motors Corp., 857 F. Supp. 100 (D.D.C. 1994) 15

TABLE OF AUTHORITIES – Continued

Page

New York Cent. R.R. Co. v. Johnson, 279 U.S. 310 (1929) 6, 12, 14

Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 523 (2d Cir. 1992) 11

Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988) 12

Richardson v. Marsh, 481 U.S. 200 (1987) 12

Trytko v. Hubbell, Inc., 28 F.3d 715 (7th Cir. 1994) 6

United States v. Achtenberg, 459 F.2d 91 (8th Cir.), *cert. denied*, 409 U.S. 932 (1972) 12

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941) 17

STATE CASES

Dyer v. Bergman & Assoc., Inc., 657 A.2d 1132 (D.C. 1995) 16, 18

Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995) 15, 16, 17, 18

Nimetz v. Cappadona, 596 A.2d 603 (D.C. 1991) 17

O'Connell v. Maryland Steel Erectors, Inc., 495 A.2d 1134 (D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) 17

Robinson v. Washington Internal Medicine Associates, P.C., 647 A.2d 1140 (D.C. 1994) 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL CONSTITUTION AND STATUTES

U.S. Const., Amendment V 2, 11

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981a 3

42 U.S.C. §§ 2000e to 2000e-17 3

Fed. R. Civ. P. 50 4

Fed. R. Civ. P. 59 ..... 4, 11

STATE STATUTES

District of Columbia Human Rights Act, D.C. Code §§ 1-2501 to 1-2557 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner, The Washington Times Corporation, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

On July 22, 1996, the United States Court of Appeals for the District of Columbia Circuit issued a Judgment and Memorandum Opinion, reproduced herein as Appendix A. The United States District Court for the District of Columbia issued a Judgment on the Verdict for the Plaintiff on March 1, 1995 (Appendix B) and issued a Memorandum Opinion on August 17, 1995 denying Petitioner's post-trial motions (Appendix C). On September 6, 1996, the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing *In Banc* (Appendix D).

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit entered judgment on July 22, 1996 (App. A). The court of appeals subsequently denied rehearing and rehearing *en banc* on September 6, 1996 (App. D). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The United States Constitution, Amendment V:

> [N]or shall any person . . . be deprived of life, liberty or property, without due process of law.

Rule 59(a) of the Federal Rules of Civil Procedure:

> A new trial may be granted to all or any of the parties and on all or part of the issues . . . in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

In this case, the respondent, Julie Berman, brought suit against the petitioner, The Washington Times Corporation ("WTC"), alleging sexual harassment, sex discrimination, retaliation and wrongful constructive discharge. The alleged unlawful conduct occurred while Berman worked for News World Communications, Inc. d/b/a The Washington Times ("The Times"), which publishes a daily newspaper for the Washington, D.C. metropolitan area. Berman worked as a senior designer in the promotion department of The Times.

The jury hearing the case returned a verdict in Berman's favor on the sex discrimination, retaliation and constructive discharge counts; the jury ruled in favor of WTC on the count of sexual harassment. The jury

awarded $47,185 in compensatory damages and $742,000 in punitive damages. Berman was able to receive such a large punitive damage award because she not only sued under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e to 2000e-17, but also the District of Columbia Human Rights Act ("DCHRA"), D.C. Code §§ 1-2501 to 1-2557.[1]

Central to Berman's claim that she was the victim of discrimination was her contention that she received different and less desirable work assignments than the male artists in the promotion department. App. 4. In closing argument, Berman's counsel attempted to circumvent the factual record establishing that Berman's work was comparable to the work of male artists by falsely asserting that WTC had either improperly withheld from discovery or destroyed documents that would have supported Berman's contention. Despite the objections of counsel for WTC – which the trial judge overruled – Berman's counsel repeatedly asserted that WTC was engaged in a "cover up" and deliberately "destroyed the paperwork." Furthermore, the trial judge refused a request from WTC's counsel that the jury be instructed to disregard counsel's misstatements.

The prejudicial effect of counsel's remarks was not confined to the issue of liability. The contention that WTC intentionally destroyed evidence clearly affected the jury's determination that WTC acted so maliciously that a

---

[1] There is a cap on compensatory and punitive damages under Title VII. 42 U.S.C. § 1981a.

sizable punitive damages award was appropriate. Moreover, counsel for Berman also deliberately inflamed the jury's passions in a manner calculated to leave the jury convinced that WTC was hostile to women. During her rebuttal, Berman's counsel told the jury that WTC's inside counsel was so hostile to women that he would not assist "somebody [who] was raped in front of him." Given counsel's blatantly improper and vituperative remarks, it is not surprising that the jury was manipulated into the imposition of a large punitive damages award – in the absence of any record support for this award. (It is significant that the court of appeals thought the only possible basis for a punitive damages award might have been the jury's impression that WTC showed "unresponsiveness to the complaints of Berman", App. 9; if so, this impression was forcefully and indelibly conveyed by the "rape" comment.)

Following the verdict, WTC moved for judgment as a matter of law and, in the alternative, a new trial, pursuant to Fed. R. Civ. P. 50 and 59. The district court denied these motions. The district court also denied WTC's motion to vacate or reduce the punitive damages award. App. 34.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the judgment as to liability and as to the propriety of some award of punitive damages.[2] The court of appeals concluded that Berman's

---

[2] The court of appeals remanded to the district court the issue of the proper quantum of punitive damages, instructing it to reconsider this issue in light of this Court's decision in *BMW v. Gore*, 116 S. Ct. 1589 (1996). App. 13.

counsel had conducted herself improperly: "The closing statement of plaintiff's counsel, and in particular her rebuttal statement, contained several inflammatory remarks, including the allegation – not supported in the record – that the Times had destroyed evidence." App. 10. However, the court of appeals also concluded that the district court's generic instruction (*not* given in response to WTC's objections) that the jury should not regard the statements of counsel to be evidence, was sufficient to neutralize any prejudicial effect from counsel's remarks.[3]

---

[3] The trial court judge included, as part of his charge to the jury, the following instruction:

> I told you at the outset of the trial. . . . After all the evidence was in you would be exposed to the closing arguments and the closing statements of counsel and at that time I believe I told you or cautioned you that those statements were not evidence. . . .
>
> . . . .
>
> At the close of the case counsel are allowed to make a closing argument at which time they take that opportunity to point out those aspects of the evidence which you have heard over the past couple weeks which they think most nearly supports their position. In any event, the statements of counsel do not constitute evidence in themself.

REASONS FOR GRANTING THE WRIT

I. THE RULING OF THE COURT OF APPEALS ON THE EFFECTIVENESS OF GENERIC INSTRUCTIONS MADE BY THE TRIAL COURT IS IN CONFLICT WITH THE RULINGS OF OTHER FEDERAL COURTS OF APPEALS

There is no dispute that it is improper for counsel in closing argument to refer to matters not in evidence. *New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310, 316-18 (1929). "Though the scope of closing argument is broad, counsel may not make reference to matters not in evidence." *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 727 (7th Cir. 1994). It is "[a] particularly indefensible tactic [to] use . . . the closing argument to bring before the jury damaging facts not in evidence and never established." *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 284 (5th Cir. 1975). This impropriety is magnified when counsel implies that probative evidence would have been placed before the jury but for the adverse party's destruction or manipulation of the evidence. *Draper v. Airco, Inc.*, 580 F.2d 91, 96 (3d Cir. 1978).

In this case, Berman's counsel repeatedly referred to matters not in the evidence. In particular, she referred to an exit interview memorandum, notes allegedly taken by a manager during a meeting with Berman, performance evaluations of women other than Berman and, most importantly, examples of Berman's work product. Counsel's references to these imaginary or absent documents were often coupled with the accusation that WTC had improperly withheld or destroyed documents:

Where are the rest of the performance evaluations for all the other women? . . . They are not there. If the defendant was going to say that there was a trend on this they would have shown you the rest of them.

. . . .

You heard a lot of evidence in this case of The Washington Times covering up their acts in this case. For example, . . . when you are listening to the defendant's closing argument be asking yourself where is Stacey Codosh's exit interview?

. . . .

Now the other questions that you want to ask yourself are, where are Tracey Hoff's minutes from Julie Berman's January, 1991 meeting and Julie Berman's March, 1991 meeting?. . . . [A]nd if you had Tracey Hoff's notes you would know that, if you had Tracey Hoff's notes from the March meeting you would know that.

. . . .

Now, what's the next thing you see? Defendant's Exhibit 102, this is the EEOC request for documents. It asks for them to produce all of the records, all of the work products of all the artists because it is all males and Julie. Do they produce it? No. Have they produced it in this case? No. It would be a whole lot easier for us if we were sitting here and we could say, okay, now, these are Julie Berman's projects . . . this is the design she did and these are the other males.

. . . .

In my earlier argument to you I said to listen for some explanations for several things and I didn't hear them and I didn't think you did either. Those include Stacey Codosh's exit interview. Those include Tracy Hoff's notes in January and March of 1991. Those include all of the work, the design work and the production work and any of the lists of design work and the production work for all of these artists. Why are those missing?

Now, Miss Barondes [WTC's counsel] makes great waves about how the paper trail that you are supposed to review isn't favorable to Julie Berman. That's because they destroyed the paperwork, the paper trail.

. . . .

Now, these charts are a great example and should remind you as you look at those as to what's going on here, what's missing from this picture. How could these charts have been created without the underlying documentation? They can't but why wasn't the underlying documentation provided to us? Because it would have shown that Julie Berman had twenty-two design projects and all the other artists had several hundred projects.

. . . .

And so you need the documentation. You need the underlying documentation and the EEOC asked for it in November of 1991 and it wasn't produced. The paper trail isn't there because The Washington Times wants you to see a little bit of a picture and hides

> from you all the things that would have shown exactly what Julie Berman was saying.[4]

No one who understands the limitations of closing argument can defend these unsubstantiated assertions. The court of appeals agreed they were improper. App. 10. The issue is what the trial court's response should have been to these deliberate and calculated transgressions by Berman's counsel.

If the trial court had sustained the objections of WTC's counsel to these remarks or directed the jury to ignore these remarks, perhaps the prejudice to WTC could have been avoided. Inexplicably, however, the trial court consistently overruled these objections and refused to issue a curative instruction. Indeed, the trial court apparently thought it was permissible to comment on documents not in evidence, as indicated by this colloquy between counsel for WTC and the trial court:

> [By counsel for WTC]: My argument is that it is improper for her to argue to the jury about documents that were not put in evidence. If she –
>
> [By the Court]: They don't have to be put in evidence.
>
> [By counsel for WTC]: What she is trying to say is that they are supposed to draw some

---

[4] All of these excerpts are from the closing argument (including rebuttal) of Berman's counsel, as recorded in the trial transcript from February 27, 1995. Omitted are the objections of WTC's counsel, as well as the comments of the trial judge overruling the objections (when he bothered to respond to the objections).

> inference from the fact that it wasn't put in evidence. The reason why it wasn't put in evidence is because they didn't pursue it. We are not going to put it in. It is up to them to pursue it and now they are trying to get the jury to draw inference of something that was done and that's improper. If they wanted that document they should have pursued it. It is not up to us to make –
>
> . . . .
>
> [By the Court]: Well, skirt it. Get around it.
>
> [By counsel for WTC]: We would ask for the jury to be instructed that they should disregard those comments.
>
> [By the Court]: I won't do that.

Moreover, as indicated, Berman's counsel did not limit herself to arguing on the basis of non-record material or accusing WTC of document destruction. She also, again over the ignored objection of WTC's counsel, made an accusation of grossly immoral conduct by a representative of WTC. One of Berman's allegations was that no employer representative responded to her complaints of discriminatory treatment. John Martin, WTC's in-house counsel and its corporate representative at trial, testified that he met with Berman and investigated her complaints. To discredit Martin, Berman's counsel launched a vicious attack on Martin's character, excoriating him, and through him, WTC, for alleged hostility to women: "When somebody comes in and says there is a problem you investigate. You start some training now, not with John Martin who can't, who if somebody was raped in

front of him would say I can't prove she wasn't consenting."

Counsel's use of the emotionally charged term "rape" in this sexual discrimination case was inherently improper and prejudicial. It conjured up images of violence, terror, and victimizing. The remark not only maligned the character of John Martin by implying that he condones acts of criminal violence against women, but also implied that WTC was guilty of hostility toward women sufficient to justify the sanction of punitive damages.

When confronted with demagogic closing argument similar to that in the instant case, other federal courts of appeals have concluded, in stark contrast to the D.C. Circuit, that a general, boilerplate instruction to the effect that closing arguments do not constitute evidence is *not* sufficient: It is *not* sufficient to avoid prejudice to a party that has been victimized by unsupported, intemperate accusations and distortions of the record that the trial judge refused to control. Applying the Constitution's guarantee of due process and the standards developed under Fed. R. Civ. P. 59 for granting new trials, these courts have refused to uphold verdicts that have not been protected from corruption by specific curative instructions. For example, the Second Circuit, in *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992), ruled that "[t]he combination of the overruled objection, the absence of a curative instruction and the giving of only the standard jury charge regarding arguments of 'counsel could only have left [the jury] with the impression that they might be influenced by the improper argument in reaching the verdict, and thus its prejudicial

effect was enhanced' " (quoting this Court's decision in *New York Cent. R.R.*, 279 U.S. at 318). The First Circuit, in *Polansky v. CNA Ins. Co.*, 852 F.2d 626, 628 (1st Cir. 1988), ruled that in the face of improper remarks by counsel during closing argument, "a blanket instruction from the court that argument of counsel is not evidence" will not avoid prejudice. The Third Circuit, in *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977), ruled that a specific curative instruction is needed "when counsel's closing argument introduces extraneous matter which has a reasonable probability of influencing the verdict." The Eleventh Circuit, in *Allstate Ins. Co. v. James*, 845 F.2d 315, 319-20 (11th Cir. 1988), ruled that inflammatory remarks require a specific limiting instruction. *See also United States v. Achtenberg*, 459 F.2d 91, 98-99 (8th Cir.), *cert. denied*, 409 U.S. 932 (1972) (ruling, in a criminal case, that a specific curative instruction was necessary).

Petitioner recognizes that this court has endorsed the rule "that juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). However, that presumption, when applied to the facts of the instant case, does nothing to remove the taint from the jury's verdict. A generic instruction that counsel's arguments are not evidence, contained in the general charge to the jury, when combined with the impassivity of the trial judge in response to the improper statements of Berman's counsel and the multiple objections thereto by WTC's counsel, does not remove the prejudice. If anything, as a matter of logic, the generic instruction exacerbates the prejudice. When the trial judge instructs the jury that counsel is limited to "point[ing] out those

aspects of the evidence which you heard" *and* also overrules or ignores objections to counsel's closing argument, a juror will reason as follows:

> • The court has told us counsel is supposed to comment only on evidence;
>
> • The court has overruled or ignored objections to counsel's remarks;
>
> • Therefore, the court has expressly approved counsel's remarks and what counsel refers to should be regarded as evidence.

As the Eleventh Circuit observed in *Allstate*, "[o]verruling an objection connotes a certain approval of the direction of counsel's argument and refusal to limit its impact through an instruction heightens the possibility that a jury will be persuaded by an improper tone or suggestion within those comments." 845 F.2d at 319.

In the face of grossly improper argument, such as that at issue here, the court should sustain opposing counsel's objections or, at a minimum, issue a curative instruction specifically tailored to remedying counsel's misleading and inflammatory remarks. That is what the First, Second, Third and Eleventh Circuits have indicated should be done. This court should review the decision of the District of Columbia Circuit to ensure that this minimum level of procedural fairness is guaranteed throughout the federal court system.

There are no perfect trials, and, of course, this Court cannot micromanage the decisions of the lower federal courts in a vain attempt to achieve this impossible standard. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). But recognition that there is no such

thing as perfect procedural justice should not become an excuse for failing to set forth guidelines that can be readily understood and followed and will do much to further the goal of fair and impartial litigation. A rule that specific curative instructions are needed when counsel's closing argument prejudicially refers to matters not in evidence or contains inflammatory rhetoric will help prevent the unprincipled tactics of counsel who believe they can flout the rules governing closing argument with little, if any, risk.

Nearly seventy years ago in *New York Central Railroad* – apparently the last time this Court addressed in detail the scope of closing argument in a civil case – this Court observed that civil trials are not just of concern to the litigants: "The state, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence." 279 U.S. at 318. Unless the passage of time is to turn these words into a high-minded platitude barren of consequences, this Court should grant the instant petition.

II. THE COURT BELOW FAILED TO FOLLOW THE RULE USED BY OTHER FEDERAL COURTS OF APPEALS IN DETERMINING THE RETROACTIVITY OF A STATE COURT DECISION

Because the award of punitive damages in the instant case was based on District of Columbia law, the lower courts were bound to apply District of Columbia law in

determining whether the evidence was sufficient to support an award of punitive damages. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989) ("[I]n any . . . lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.").

While this case was pending on appeal, the District of Columbia clarified the evidentiary standard for an award of punitive damages, indicating that a "clear and convincing evidence" standard would be used instead of a "preponderance of the evidence" standard. *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995).[5] The trial court had applied the prevailing "preponderance of the evidence" standard in concluding that the jury's award of punitive damages was not unreasonable.

Despite the intervening decision of the D.C. Court of Appeals in *Breeden*, the court below continued to use the preponderance of the evidence standard. Furthermore, the court of appeals justified its decision to utilize this standard by reasoning that since the issue "was still open and undecided at the time of trial . . . the supervening authority doctrine does not apply" and "the evidence presented at trial [should be reviewed] in terms of the

---

[5] Technically, there was no change in law as the D.C. Court of Appeals had never squarely decided what the evidentiary standard should be for an award of punitive damages. However, most courts applying D.C. law had used the preponderance of the evidence standard. *See, e.g., Nakajima v. General Motors Corp.*, 857 F. Supp. 100, 103 (D.D.C. 1994).

federal 'preponderance of the evidence' standard." App. 9.

The decision of the D.C. Circuit thereby conflicts with decisions of the other federal courts of appeals with respect to the retroactive effect of state court decisions. *E.g., Miller v. County of Santa Cruz*, 39 F.3d 1030, 1035 (9th Cir. 1994); *Izard v. United States*, 946 F.2d 1492, 1494-95 (10th Cir. 1991); *McGowan v. Univ. of Scranton*, 837 F.2d 1242 (3d Cir. 1988); *Demmer v. Patt*, 788 F.2d 1387, 1388-89 (8th Cir. 1986). These decisions all indicate that the task of the federal court is to determine whether under state law the state court decision would be given retroactive effect.

Here by contrast, the court of appeals peremptorily decided that because District of Columbia law on the evidentiary standard for punitive damages was "open and undecided at the time of the trial", it would make no effort to predict what retroactive effect the District of Columbia would give to *Breeden*.[6] Instead, it applied the *federal* evidentiary standard. This use of the federal evidentiary standard for an issue otherwise governed by

---

[6] The court of appeals suggested that it did not have to determine retroactivity because WTC had not requested a jury instruction on the clear and convincing evidence standard. App. 8-9. The court's reasoning on this point can charitably be described as obscure. Failure to request an instruction would provide a basis for an appellate court's refusal to reach the issue of the proper standard *if* the law were undecided. *Cf. Dyer v. Bergman & Associates, Inc.*, 657 A.2d 1132, 1139 (D.C. 1995). However, failure to request a relevant instruction does not provide a reliable platform for the court's leapfrogging conclusion that a dispositive decision rendered after trial should not be given retroactive effect.

state law is not only in conflict with the approach of other federal courts, but is incompatible with this Court's decisions regarding the obligations of federal courts to adhere to decisions of a state's highest court when applying state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *see also Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

Moreover, it is clear that had the court of appeals tried to determine whether the District of Columbia would apply *Breeden* retroactively, the only defensible conclusion would have been in favor of retroactive application. The District of Columbia has not yet decided whether to follow this Court's decision in *Harper v. Virginia Dep't of Taxation*, 113 S.Ct. 2510 (1993), holding that (in federal cases) judicial decisions in civil cases are presumptively retroactive. *Robinson v. Washington Internal Medicine Associates, P.C.*, 647 A.2d 1140, 1146 (D.C. 1994). However, if the District of Columbia does not follow the *Harper* rule, it will follow the guidelines set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1977). *Robinson*, 647 A.2d at 1146. Under *Chevron Oil's* guidelines, *Breeden* is indisputably retroactive.

The *Chevron Oil* analysis starts from the premise that judicial decisions apply to pending cases, while recognizing that exceptions may be necessary to prevent inequitable results. As a threshold matter, to avoid retroactivity, the judicial decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Nimetz v. Cappadona*, 596 A.2d 603, 608 (D.C. 1991) (quoting *Chevron Oil*, 404 U.S. at 106-07). *See O'Connell v. Maryland Steel Erectors, Inc.*, 495 A.2d 1134, 1139

(D.C. 1985), *cert. denied*, 475 U.S. 1066 (1986) (first *Chevron* factor is threshold test that must be met before an opinion will be given nonretroactive effect). The D.C. Court of Appeals decision in *Breeden* did not overrule past precedent and did not represent a clear break with the past. The court adopted a standard that has gained increasing support in other jurisdictions, including Maryland. Further, the court's endorsement of the clear and convincing evidence standard had been foreshadowed in its earlier decision in *Dyer v. Bergman & Associates, Inc.*, 657 A.2d 1132, 1139 (D.C. 1995). Because the first *Chevron Oil* factor is not satisfied, the District of Columbia will apply *Breeden* retroactively, and the court of appeals should have applied *Breeden* retroactively after consulting District of Columbia law on retroactivity.

This Court should review the decision below to secure conformity among the federal courts of appeals when they determine the retroactivity of state court decisions.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectively submitted,

ANITA BARONDES*
RONALD A. LINDSAY

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
(202) 463-2400

Attorneys for Petitioner

**Counsel of Record*

Dated: October 11, 1996

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7224 **September Term, 1995**

Julie Berman,

Appellee

v.

The Washington Times Corporation,

Appellant

Appeal from the United States District Court
for the District of Columbia
(No. 92cv02738)

Before: GINSBURG, SENTELLE AND TATEL, *Circuit Judges.*

JUDGMENT

(Filed Jul. 22, 1998)

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of counsel. The court is satisfied that appropriate disposition of this case does not call for further opinion. *See* D.C. Cir. Rule 36(b).

For the reasons stated in the attached memorandum, it is ORDERED and ADJUDGED that the judgment of the district court from which this appeal has been taken be AFFIRMED in part and REMANDED for reconsideration

of the punitive damage award in light of the Supreme Court's decision in *BMW v. Gore*, 116 S. Ct. 1589 (1996).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(2). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandates for good cause shown.

Per curiam
FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/ Robert A. Bonner
Deputy Clerk

MEMORANDUM OPINION

The Washington Times Corporation brought this appeal following a jury verdict that awarded compensatory and punitive damages to Julie Berman on her discrimination, constructive discharge, and retaliation claims. The Times contends that the district court erred in denying its motions for a new trial, for judgment as a matter of law, and for remittitur. We affirm the judgment of the district court in part and remand the matter for reconsideration of the punitive damage award in light of the Supreme Court's recent decision in *BMW v. Gore*, 116 S. Ct. 1589 (1996).

I. Sufficiency of the Evidence: Judgment as a Matter of Law and Motion for a New Trial

In order to establish that the district court erred in denying the motion for judgment as a matter of law, the Times must show that " 'the evidence, together with all inferences that can be reasonably drawn therefrom[,] is so one-sided in favor of the moving party that reasonable men could not disagree on the verdict.' " *Grogan v. General Maintenance Serv. Co.*, 763 F.2d 444, 447 (D.C. Cir. 1985). The burden on the appellant is quite heavy, given that the scope of our review is "narrow" and we are "to consider all the evidence . . . in the light most favorable to the successful party below." *Id.*

This court's review of the district court's denial of the appellant's motion for a new trial is also "limited." *Id.* Disposition of a motion for a new trial "is a matter entrusted to the sound discretion of the trial court," and we review the district court's decision only for an abuse of discretion. *Id.* When the basis for the motion for a new trial is that the evidence is insufficient to support the verdict, the reviewing court "owes deference both to the trial judge and the jury" and its review is therefore "particularly narrow." *Id.* at 447-48.

Having reviewed the record and the trial transcript with appropriate deference to the district court, we conclude that the evidence adduced at trial – though by no means overwhelming – was sufficient to permit a reasonable jury to find in favor of Berman.

A. Discrimination

To prove her claim of discrimination, Berman testified that following the change of management in her department she (i) did far less design work than she had done before; (ii) did a disproportionate amount of paste-up and filler ad work, which she and others described as less desirable than design work; (iii) was given work assignments that were different in quality from the work assigned to the male artists; and (iv) received less training than did her male counterparts. Some, though not all, of this testimony is supported by or at least consistent with testimony of other witnesses; for example, although some male artists in the department testified that they did paste-ups and filler ads as well, the jury could reasonably have concluded from their testimony that these male artists did less of this undesirable work than did Berman. Moreover, Berman presented testimony concerning statements made by her supervisor, Don Garlock, from which a reasonable jury could infer his discriminatory intent; although Garlock's statements neither referred to nor were directed at Berman herself, a jury could reasonably have concluded that evidence of Garlock's general disposition against women in the workplace ("[H]e said to me . . . he believed women, it was their duty to stay home, it was not their place to be in the work force, they didn't belong there." Tr. 2/9, II-11) showed that Garlock's decisions about Berman's work assignments were motivated by discrimination.

It is true, as the Times points out, that Berman's testimony was somewhat inconsistent with respect to the amount of design work she did. Moreover, her testimony

was not clear regarding the basis of her familiarity with the assignments of the male artists; nor was her account consistent with the department's job status reports. Berman's credibility on these points, however, is appropriately a matter for the jury, and the jury decided, not unreasonably, to credit her account. Accordingly, we cannot conclude that the district court erred in denying the appellant's motions for judgment as a matter of law and for a new trial on the discrimination claim.

B. Retaliation

Berman offered several different bases for her retaliation claim, and although some of her theories are weaker than others, at least one is sufficient to support the jury's verdict. Berman testified that in her first meeting with Tracy Hoff she told Hoff that Garlock had a problem with women. Accordingly, even though Berman did not expressly complain to Hoff that she thought that her work assignments were the product of discrimination, a jury could reasonably have concluded that during this meeting Berman lodged a complaint about sexual harassment. Based upon this protected activity, the jury could then have concluded that the subsequent decline in the quality of her work assignments was retaliatory.

The Times errs in stating that Berman "cannot avoid judgment as a matter of law" by relying solely upon her own testimony. Berman's testimony dealt in relevant part with specific facts and events; this case is therefore quite unlike those in which a court has held that a plaintiff cannot create a jury question merely by offering "generalized testimony . . . regarding his subjective belief" that

adverse employment action was the result of discrimination. *Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983); *see, e.g., Aungst v. Westinghous Elec. Corp.*, 937 F.2d 1216, 1223 (7th Cir. 1991) (affirming grant of judgment notwithstanding verdict when only evidence to disprove employer's legitimate business justification for discharge was employee's "own self-serving testimony regarding his own ability"); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985) (holding that plaintiff's "conclusory allegations of discrimination," taken alone, were insufficient to prove that employer's business justification was pretext). After hearing Berman's account of the events and circumstances, the jury was entitled to weigh her credibility against that of the other witnesses and to reach the conclusion it did.

C. Constructive Discharge

In order to prevail upon her constructive discharge claim, Berman had to show that her employer "deliberately made [her] working conditions intolerable and drove her into 'an involuntary quit.' " *Clark v. Marsh*, 665 F.2d 1168, 1176 (D.C. Cir. 1981). A plaintiff generally cannot succeed in showing constructive discharge merely by pointing to an incident of discrimination or retaliation; some "aggravating factor" must also be present. *See Clark*, 665 F.2d at 1175-76 ("the historic discrimination to which plaintiff had been subject, her repeated but futile attempts to obtain relief from that discrimination, and the predictable humiliation and loss of prestige accompanying [the adverse employment action] constitute the

'aggravating factors' "). In this case the plaintiff presented evidence of a variety of aggravating circumstances, including the Times's unresponsiveness to her internal complaints and the abusive behavior of her immediate supervisor, Garlock.

The Times argues that the allegations related to sexual harassment should not be considered in support of the jury's verdict because the jury found for the Times on the harassment claim; indeed, the Times argues that we should presume that the jury discredited the testimony concerning sexual harassment against Berman. This argument amounts in essence to a claim that the jury's verdict on the sexual harassment count is inconsistent with the rest of its verdict. The district court, however, fulfilled its obligation to harmonize the verdicts. *See Auwood v. Harry Brandt Booking Office, Inc.*, 850 F.2d 884 (2d Cir. 1988) ("If the court elects not to seek clarification from the jury, or if the inconsistency [in the answers to a special verdict] is not noticed until after the jury has been dismissed, the court must . . . attempt to harmonize the answers, if it is possible under a fair reading of them . . . [or] order a new trial"). The district court concluded that the jury may have found either that the plaintiff had endured a pattern of sex discrimination and abuse that would have prompted a reasonable person to quit but that did not amount to sexual harassment, or that the Times was responsible for the pattern of discriminatory treatment by its supervisory employees but not for Garlock's alleged acts of harassment. J.A. 62 n.3. We note that the jury also could have concluded that the evidence that Berman and others were harassed shows that the pattern of discriminatory treatment was intentional, even if the evidence did

not on its own amount to sexual harassment. In sum, because the jury need not have discredited the testimony regarding harassment in order to have rendered the verdict it did, we consider that testimony as evidence of Berman's constructive discharge.

We hold that the jury had sufficient evidence before it to support the conclusion that the Times deliberately created intolerable working conditions for Berman, either in retaliation for her internal complaints of harassment or because of her sex.

D. Punitive Damages: Judgment as a Matter of Law

Under federal law, punitive damages may be awarded if the plaintiff shows by a preponderance of the evidence that the employer acted with malice or reckless disregard for the plaintiff's federally protected rights. *See, e.g., Yarbrough v. Tower Oldsmobile, Inc.*, 789 F.2d 508 (7th Cir. 1986). The Times argues that the "clear and convincing evidence" standard recently adopted for punitive damages by the D.C. Court of Appeals, *see Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995), should apply in this case. The Times contends that its failure to argue this point at trial or to request a "clear and convincing" instruction should be excused because until the decision in *Breeden*, which was released after the trial in this case, the D.C. Court of Appeals had not made clear that this standard governs punitive damages.

Although it is true that the D.C. Court of Appeals acknowledged in *Breeden* that it had never before announced the standard of proof for punitive damages,

see 665 A.2d at 937, that demonstrates only that the issue was still open and undecided at the time of the trial in this case; therefore, the supervening authority doctrine does not apply. *Accord Dyer v. Bergman & Assoc., Inc.*, 657 A.2d 1132, 1139 (D.C. 1995) (noting in case preceding *Breeden* that standard of proof was yet unresolved but declining to resolve it because defendant had not demanded "clear and convincing" standard at trial). Accordingly, we review the evidence presented at trial in terms of the federal "preponderance of the evidence" standard.

The jury could reasonably have concluded that an award of punitive damages in this case was warranted based upon the Times's unresponsiveness to the complaints of Berman and other women who worked with and for Garlock. *Cf. Yarbrough*, 789 F.2d at 514-15 (upholding punitive damage award where owners of company were "unresponsive" to complaints of race discrimination). We therefore affirm the district court's denial of the Times's motions for judgment as a matter of law and for a new trial on the claim for punitive damages.

II. Motion for a New Trial: Other Grounds

We reject the Times's argument that a new trial is warranted because of inappropriate and biased behavior by the trial judge in the presence of the jury. The district judge was quite careful to instruct the jury both at the beginning and at the end of the trial that his conduct was not relevant to the jury's fact-finding and that the jurors should not be swayed by any of his questioning, statements, or even facial expressions during the trial. Given

the clarity of these instructions, we conclude that the district judge acted within his discretion in concluding that no bias on his part prejudiced the jury.

The closing statement of plaintiff's counsel, and in particular her rebuttal statement, contained several inflammatory remarks, including the allegation – not supported in the record – that the Times had destroyed evidence. Once again, however, the district judge carefully instructed the jury that statements of counsel are not evidence, and he admonished the jurors to make their decision based upon the evidence and not upon their passions or sympathies. In light of this instruction, and in consideration of the record as a whole, we conclude that the district court did not abuse its discretion in concluding that the remarks of plaintiff's counsel did not so prejudice the jury as to warrant a new trial.

Finally, the Times argues that the district court erred in admitting evidence of discrimination involving other female employees in order to prove an intent to discriminate against Berman; this testimony, according to the Times, is "prior bad acts" evidence admitted for the purpose of showing a propensity to discriminate. The Times's argument, however, is in conflict with our decision in *Morris v. Washington Metropolitan Area Transit Authority*, 702 F.2d 1037 (D.C. Cir. 1983), in which we noted that "[t]he question of the legitimacy of the employer's motivation in firing the employee . . . is one upon which the past acts of the employer have some bearing. . . . They also tend to show the existence of a 'custom or policy'. . . . " *Id.* at 1045, or what in this context would be called a "pattern or practice" of discrimination. Accordingly, the testimony regarding other

instances of discrimination was admitted for a permissible purpose under Rule 404(b) of the Federal Rules of Evidence.

III. Motion to Remit or Set Aside the Punitive Damage Award

The Times presents three grounds upon which it contends the district court should have granted its motion to remit or set aside the punitive damage award. The Times argues first that the district court erred in refusing to instruct the jury that Berman would be eligible to receive attorney's fees if she prevailed at trial; this error, the Times contends, "inevitably created a windfall and double recovery" by permitting the jury to inflate its punitive damage award in order to compensate Berman for her litigation expenses. We find no support for the proposition that a trial court must give an instruction of the sort requested. Had the district court affirmatively instructed the jury that under D.C. law the costs of litigation are relevant to the jury's assessment of punitive damages, the court's refusal also to give the instruction proposed by the Times might indeed have been error. But we are aware of no point in the trial, nor does the Times direct us to one, when the jury was instructed that it could take into account the plaintiff's litigation costs. Accordingly, we are not persuaded that the district court erred in refusing to remit or set aside the verdict on this basis.

Next the Times argues that the district court abused its discretion by failing to set aside or remit the verdict because of its "excessiveness." *Cf. R.A. Weaver & Assoc.,*

Inc. v. Haas & Haynie Corp., 663 F.2d 168, 174 (D.C. Cir. 1980) (district court should not set aside punitive damage award unless it is "so great as to shock the conscience" or "so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate"). The Times presents this as a distinct claim separate from its argument that the award violates the constitutional guarantee of due process; hence we look to the law of the District of Columbia for guidance on the standard a district court should apply in reviewing a jury's punitive damage award. *Cf. Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) ("In reviewing an award of punitive damages [granted under state law], the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard").

In the District of Columbia, "an award of punitive damages may not be reduced unless it is 'grossly excessive.' " *Robinson v. Sarisky*, 535 A.2d 901, 908 (D.C. 1988). The Times has not directed us to any standards in D.C. law that illuminate the term "grossly excessive," but we do know at least that the District of Columbia courts are not persuaded by the comparison between compensatory and actual damages in a particular case. *See id.* at 907 (plaintiff need not prove more than nominal actual damages to justify the imposition of punitive damages). The district court in the present case reviewed the award of punitive damages and found it neither "unreasonable"

nor "against the 'clear weight' of the evidence," J.A. 63, noting that "other courts have upheld comparable awards in employment discrimination cases." J.A. 66. Because we are aware of no District of Columbia standard, "federal common-law standard, or compelling federal policy, which convinces us that we should not continue to accord considerable deference to a district court's decision not to order a new trial," *Browning-Ferris Indus.*, 492 U.S. at 279-80, we conclude that the district judge in this case did not abuse his discretion in refusing to remit or set aside the award as "excessive" under D.C. law.

In order to resolve the Times's claim that the punitive damage award offends the constitutional guarantee of due process, however, a remand to the district court is the most appropriate course. The Supreme Court decided *BMW v. Gore*, 116 S. Ct. 1589 (1996), during the pendency of this appeal. The Court there set out "three guideposts" for lower courts determining whether a punitive damage award exceeds the constitutional limit – that is whether the award is in line with "[e]lementary notions of fairness," which "dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." 116 S. Ct. at 1598. Those three guideposts are (i) the degree of reprehensibility of the conduct; (ii) the disparity between the punitive damage award and the harm or potential harm suffered by the plaintiff; and (iii) the difference between the remedy in the case at bar and the civil penalties authorized or imposed in comparable cases. 116 S. Ct. at 1598-99. We are as well situated as the district court to perform the comparisons called for by the second and third of these guideposts: The ratio of

punitive damages to compensatory damages is 15 to 1, which is significantly lower than the 500-to-1 ratio in *BMW* but still quite a bit higher than the ratio of 4-to-1 that the Supreme Court described as "close to the line." 116 S. Ct. at 1602 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991)). The award in this case is also more than twice the statutory cap for compensatory and punitive damages in Title VII cases, *see* Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)(D). Neither of these guideposts places a firm ceiling upon an award of punitive damages, however; whether the ratios in the present case are justified depends upon the first of the *BMW* factors, namely, the reprehensibility of the defendant's conduct. *See* 116 S. Ct. at 1602 (rejecting "a categorical approach" and noting that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages"). Moreover, the Supreme Court indicated in *BMW* that a disparity between a punitive damage award and other sanctions available for comparable misconduct might be justified if the award is "necessary to deter future misconduct," as demonstrated by, for example, "a history of noncompliance with known statutory requirements." 116 S. Ct. at 1603.

The district court rejected the claim that the punitive damage award was unconstitutional, concluding that it "reasonably accounted for the nature of the Defendant's wrongdoing, the need to deter similar conduct in the future, and the financial state of the Defendant." J.A. 68. The court found that the size of the award was justified "given the seriousness of the Defendant's apparent

wrongdoing, its refusal to address Garlock's attitude toward female subordinates despite several complaints, and the size and financial condition of the Defendant." J.A. 66. In considering these factors, however, the district court did not have the benefit of the Supreme Court's guidance in *BMW*. We therefore remand the case for the district court to consider the defendant's due process argument in light of *BMW*, as it would have done in the first instance but for the accident of timing by which that case was decided during the pendency of this appeal.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIE BERMAN

Plaintiff(s)

v. Civil Action No. 92-2738

THE WASHINGTON TIMES CORPORATION (Filed Mar. 1, 1995)

Defendant(s)

JUDGMENT ON THE VERDICT FOR PLAINTIFF

This cause having been tried by the Court and a Jury, before the Honorable WILLIAM B. BRYANT, Judge presiding, and the issues having been duly tried and the Jury having duly rendered its verdict; now, therefore, pursuant to the verdict,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff(s) JULIE BERMAN have and recover of and from the defendant(s) THE WASHINGTON TIMES CORPORATION, FORTY SEVEN THOUSAND ONE HUNDRED AND EIGHTY FIVE DOLLARS ($47,185.00) as to compensatory damages and SEVEN HUNDRED FORTY TWO THOUSAND DOLLARS ($742,000.00) as to punitive damages, for the sum total of SEVEN HUNDRED EIGHTY NINE THOUSAND ONE HUNDRED EIGHTY FIVE DOLLARS ($789,185.00), together with costs.

NANCY MAYER-WHITTINGTON, Clerk

Jurisdiction is retained for

determination of equitable remedies.

Dated: March 1, 1995

Approved: /s/ William B. Bryant
WILLIAM B. BRYANT,
U.S. DISTRICT JUDGE

By: /s/ Dorothy Jones Patterson
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIE BERMAN,	)	
Plaintiff,	)	
v.	)	C.A. No. 92-2738 (WBB)
THE WASHINGTON TIMES CORPORATION,	)	
Defendant.	)	

MEMORANDUM
(Filed Aug. 17, 1995)

The Plaintiff, a woman who worked for the Defendant newspaper as a designer, filed this action in December 1992, stating claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e *et seq.* (West 1994), and the District of Columbia Human Rights Act ("HRA"), D.C. Code Ann. §§ 1-2501 *et seq.* (Michie 1992), for sexual discrimination, sexual harassment, and retaliation, as well as common law claims of intentional infliction of emotional distress and wrongful discharge.[1] The parties tried this case to a jury from February 7 to February 27, 1995. The jury deliberated for three days, reaching a verdict on March 1: although it found in favor of the Defendant on the claim of sexual harassment brought by

---

[1] The Court granted summary judgment in favor of the Defendant on the intentional infliction of emotional distress claim and on the Title VII sexual harassment claims in September 1994.

the Plaintiff under the HRA, it found that the Defendant had violated both the HRA and Title VII by discriminating against the Plaintiff on the basis of her sex during her term of employment, by retaliating against her for complaining about discrimination or harassment, and by constructively terminating her because of her sex or her complaints, and awarded the Plaintiff $47,185 in compensatory damages and $742,000 in punitive damages.

After the jury reached its verdict, the Defendant renewed its motion for judgment as a matter of law, or, in the alternative, for a new trial or remittitur of the verdict and asked the Court to alter the judgment through application of the Title VII damages cap, while the Plaintiff requested an award of back pay.[2] For the reasons set forth below, the Court will deny the Defendant's motions and award the Plaintiff back pay.

I. DEFENDANT'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, OR, IN THE ALTERNATIVE, FOR NEW TRIAL OR REMITTITUR

A. Sufficiency of the Evidence

Claiming that the jury's verdict lacks a sufficient evidentiary foundation, the Defendant has asked the Court to enter judgment as a matter of law in its favor on all counts pursuant to Rule 50(a) of the Federal Rules of Civil Procedure or, in the alternative, to order a new trial

---

[2] This Memorandum and the accompanying Order do not address the parties' outstanding disputes regarding costs and attorneys' fees.

pursuant to Rule 59(a)(1). In order to overturn a jury verdict via judgment as a matter of law, a court must determine that the evidence so overwhelmingly favors the moving party that no "reasonable" or "fair-minded" person could agree with the jury's findings. *Morgan v. District of Columbia*, 824 F.2d 1049, 1056 (D.C. Cir. 1987). When reviewing jury verdicts under this deferential standard, a court must resolve all conflicts in the evidence in favor of the prevailing party and grant that party all reasonable inferences; it cannot assess the credibility of witnesses or weigh the evidence presented. *Id.*; *Grogan v. Gen. Maintenance Serv. Co.*, 763 F.2d 444, 447 (D.C. Cir. 1985). When reviewing the sufficiency of the evidence supporting a verdict in the context of a motion for a new trial, courts also demonstrate great respect for the role of the jury as the finder of fact, granting such a motion only when a verdict appears "contrary to the 'great weight' or 'clear weight' of the evidence." *Thompson v. Int'l Ass'n of Machinists*, 614 F. Supp. 1002, 1013 (D.D.C. 1985) (citations omitted). Under these standards, the evidence presented in this case justifies neither the entry of judgment as a matter of law nor the ordering of a new trial.

1. *Disparate treatment in the workplace*

The Plaintiff presented ample evidence to support the jury's verdict that the Defendant – particularly through Don Garlock, the Plaintiff's immediate supervisor – treated the Plaintiff worse than it did the male artists in the Plaintiff's department. To begin with, the jury heard hours of testimony from the Plaintiff, her supervisors, and the male artists comparing the quality of

the Plaintiff's work assignments with those given to the male artists and had the opportunity to inspect some of the Plaintiff's completed projects, and could fairly have interpreted this evidence to demonstrate that the Plaintiff received relatively fewer creative design projects and relatively more menial tasks (such as cleaning files and camera plates and making "filler ads") than the male artists. In addition, both sides presented detailed evidence regarding the disciplinary actions taken against the Plaintiff, the negative evaluations that she received, and the treatment she endured from her supervisors; from this evidence, the jury could logically have concluded that the Defendant's supervisory employees treated the Plaintiff more harshly than it did any of the male artists, e.g., by giving her an unfairly negative performance evaluation, by suspending her without first giving her the same formal warning given to a male artist, by assigning another employee to keep a log regarding her work performance, or by frequently yelling or glaring at her. By considering the testimony of the Plaintiff and the other artists as well as the evidence regarding the Plaintiff's success in the positions she held both before and after she worked under Garlock, the jury also could reasonably have rejected the Defendant's claim that the Plaintiff's poor work performance provided a legitimate nondiscriminatory reason for its actions. The Court thus cannot reject the jury's conclusion that the Defendant intentionally discriminated against the Plaintiff because of her sex as either unreasonable or against the "clear weight" of the evidence.

2. *Retaliation*

Similarly, the evidence presented at trial precludes the Court from entering judgment as a matter of law on the Plaintiff's retaliation claim and from ordering a new trial based on the jury's finding of retaliation. The Plaintiff undoubtedly engaged in protected activity when she filed her charge of discrimination with the Equal Employment Opportunity Commission; the jury could also have reasonably credited the Plaintiff's testimony that she informally complained to Garlock's supervisors about his discriminatory conduct. Consistent with the evidence presented at trial, the jury could have concluded that, shortly after the Plaintiff made these complaints, Garlock and other supervisory employees gave the Plaintiff an unfairly critical performance review, confronted and threatened the Plaintiff during a meeting, and subjected the Plaintiff to even worse treatment in the workplace, and that they took these actions in order to retaliate against the Plaintiff for engaging in these protected activities.

3. *Constructive discharge*

The jury's conclusion that the Defendant made the Plaintiff's working conditions so intolerable that a reasonable person in her position would have felt compelled to resign, *see Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981), also withstands the Defendant's attack. Although a plaintiff cannot support a constructive discharge claim merely by demonstrating that she has an actionable discrimination claim, "a continuous pattern of discriminatory treatment" or discrimination accentuated by

"aggravating factors" can justify a finding of constructive discharge. *Id.* at 1173-74. Here, sufficient evidence exists to support the Plaintiff's claims that she endured an extended period of discriminatory treatment in terms of work assignments, discipline, and evaluation as well as over a year of abusive treatment at the hands of Garlock, and the jury's conclusion that a reasonable person would have quit under these circumstances must be allowed to stand.[3]

---

[3] Despite the Defendant's argument to the contrary, the Court sees no inconsistency between the jury's finding that the Defendant constructively discharged the Plaintiff and its decision not to hold the Defendant liable for sexual harassment. Indeed, the Court sees a number of ways in which to harmonize the jury's conclusions. *See,* 9A Wright and Miller, *Federal Practice and Procedure: Civil 2d* § 2510 (1995). The jury could have found, for example, that the Plaintiff endured a pattern of discriminatory treatment or a combination of discrimination and general abuse that would have prompted a reasonable person to quit, but that this discriminatory treatment did not amount to sexual harassment. *See Harris v. Forklift Sys., Inc.,* 114 S. Ct. 367, 370-71 (1993). Alternately, the jury could have found it proper to hold the corporate Defendant responsible for the pattern of discriminatory treatment meted out by its supervisory employees, but not for a few sporadic incidents of sexual harassment by one of its employees. In any event, the Defendant waived its right to challenge the consistency of the verdicts by not making this argument before the Court discharged the jury. *See Masure v. Donnelly,* 962 F.2d 128, 134 (1st Cir. 1992); *White v. Celotex Corp.,* 878 F.2d 144, 146 (4th Cir.), *cert. denied,* 493 U.S. 964 (1989).

4. *Award of punitive damages*

The evidence presented by the parties also provides adequate support for the jury's decision to award punitive damages. Because the evidence justified the conclusion that the defendant acted with malice or with reckless indifference to the Plaintiff's federally-protected rights, *see Smith v. Wade*, 461 U.S. 30, 56 (1983); *Hennessy v. Penril Datacomm Networks*, 864 F. Supp. 759, 762 (N.D. Ill. 1994), by allowing Garlock to continue to supervise the Plaintiff even after receiving complaints about his discriminatory conduct toward women, by refusing to take any type of disciplinary or even corrective action against Garlock for this conduct, and by ignoring the complaints of discrimination made by the Plaintiff and other female employees, the Court cannot reject the jury's decision to award punitive damages as either unreasonable or against the "clear weight" of the evidence.

B. The Plaintiff's Closing Argument

The Defendant also argues that the Court should grant its motion for a new trial because the Plaintiff's counsel made improper statements – comments that implied that the Defendant had destroyed certain key documents, that asked the jury to send a message to a large corporate empire, and that suggested that John Martin, the Defendant's in-house counsel and a defense witness, would not bother to investigate a rape – during her closing argument. Some of these statements amounted to nothing more than passionate advocacy: an attorney certainly has the right to note that the opposing

party has not introduced as evidence documents discussed by witnesses and to ask the jury to make an award of punitive damages sufficiently large to deter similar conduct by a large corporate defendant. While portions of the Plaintiff's closing statement may have touched upon facts not in evidence (e.g., the difficulties encountered by the Plaintiff during discovery), these statements clearly did not so permeate the closing argument or the Plaintiff's presentation during the three weeks of trial that they could have prejudiced the jury or affected the verdict. *See Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991); *Valbert v. Pass*, 866 F.2d 237, 242 (7th Cir. 1989). The Court repeatedly instructed the jury to base its verdict on the evidence presented to it rather than on the attorneys' statements or any feelings of sympathy or prejudice, thereby further minimizing the impact of these statements. *See Valbert*, 866 F.2d at 241; *Lanham v. Whitfield*, 805 F.2d 970, 972 (11th Cir. 1986).

C. Errors of Law

The Defendant argues that several errors made by the Court warrant a new trial. The Defendant first contends that the Court erred in admitting the testimony of other female employees regarding the generally negative experiences they had while working for the Defendant under Garlock. This testimony, however, served several perfectly proper functions, bolstering the Plaintiff's claim that a discriminatory animus or intent – and not some legitimate nondiscriminatory rationale – motivated Garlock's disparate treatment of her vis-a-vis the male artists, *see, e.g., Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214-15 (3d

Cir. 1995); *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155-56 (8th Cir.), *cert. denied*, 498 U.S. 854 (1990); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596-98 (1st Cir. 1987); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986), and demonstrating that the Defendant had notice of Garlock's tendency to treat women as inferiors in the workplace, *see, e.g., Hunter*, 797 F.2d at 1423-24; *Rauh v. Coyne*, 744 F. Supp. 1186, 1189 (D.D.C. 1990). The introduction of this evidence during the trial did not cause significant delay or confusion, and did not divert the focus of the proceedings from the Defendant's treatment of the Plaintiff; the probative value of this testimony thus far outweighed any unfair prejudice it may have caused.

In addition, the Defendant contends that the Court erred in admitting into evidence testimony regarding Tracey Hoff's employment experiences, resignation from the Defendant, and separation agreement; the testimony of Dana Martin, the Plaintiff's former supervisor, regarding the Plaintiff's work performance; and evidence relating to the alleged emotional distress the Plaintiff suffered while working for the Defendant. It also maintains that the Court gave the jury several erroneous instructions, and demonstrated partiality in favor of the Plaintiff. The Court believes that neither the admission of this evidence, the issuance of these instructions, nor the Court's conduct during the trial constitutes error, and that, in any event, these alleged errors had no effect on "the essential fairness of the trial." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984). *See also*, Fed. R. Civ. P. 61.

D. Award of Damages

The Defendant has attacked the jury's large damage award on a number of fronts. To begin with, it has asked the Court to declare the size of the award excessive, and thus to order a new trial or remittitur. While the Court does have the power to overturn an excessive jury verdict, it can only do so if it "is beyond all reason, or . . . is so great as to shock the conscience," or "is so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may properly operate." *Jeffries v. Potomac Dev. Corp.*, 822 F.2d 87, 96 (D.C. Cir. 1987) (quotations omitted). This standard of review does not allow the court to substitute its view of the appropriate damages for that of the jury, and demands respect for a jury's exercise of its collective judgment if the evidence presented allows a characterization of its award as reasonable. *Griffiths v. Cigna Corp.*, 857 F. Supp. 399, 408-9 (E.D. Pa. 1994).

The Court sees no reason to disturb the jury's collective assessment of the appropriate damages in this case. Although the Plaintiff certainly won a large verdict, it is not unreasonable given the seriousness of the Defendant's apparent wrongdoing, its refusal to address Garlock's attitude toward female subordinates despite several complaints, and the size and financial condition of the Defendant. Furthermore, while the unique facts and circumstances of each case make meaningful comparisons among jury awards difficult, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2720 (1993) (plurality opinion), it seems worth noting that other courts have upheld comparable awards in employment

discrimination cases. *See, e.g., E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 902-4 (9th Cir. 1994); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1062 (8th Cir. 1993); *Griffiths*, 857 F. Supp. at 408-10. The jury's damage award thus does not strike the Court as so unreasonably large as to justify a new trial or remittitur.

The Defendant also claims that the jury's punitive damage award violates the Constitution's Due Process Clause. It first argues that the Court's instructions at the close of the trial did not properly restrain the jury's discretion in awarding punitive damages. Due process, however, requires only that a trial court's instructions limit the jury's discretion by adequately describing the nature and purposes of punitive damages. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19-20 (1991). The Court's jury instructions in this case cabined the jury's consideration of punitive damages in this manner, explaining that the jury can award such damages in order to punish the Defendant for extraordinary wrongdoing or to deter similar misconduct in the future; that the jury should consider the offensiveness of the conduct, the relationship between the compensatory and punitive damages, and the Defendant's financial conduct in calculating such an award; and that the imposition of punitive damages was not compulsory. Indeed, the Court's instructions restrained the jury's exercise of its discretion even more than did the instructions approved by the Supreme Court in *Haslip*: in that case, the trial court told the jury only that the award of punitive damages was not compulsory, that such damages serve the goals of retribution and deterrence, and that the jury should base the size of its award on "the

character and the degree of the wrong . . . and necessity of preventing similar wrong." *Id.* at 6 n.1.[4]

In addition, the Defendant asks the Court to declare the jury's punitive damage award unconstitutional because it appears so large in light of the Defendant's financial state and in comparison with the compensatory damages awarded. The Due Process Clause does require courts to review verdicts in order to "ensure[ ] that punitive damage awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages" and that such awards are not "greater than reasonably necessary to punish and deter." *Id.* at 22. As set forth above, the Court believes that the jury's damage award reasonably accounted for the nature of the Defendant's wrongdoing, the need to deter similar conduct in the future, and the financial state of the Defendant. Given the Court's instruction to the jury to consider the relationship between any compensatory and punitive damages awarded, the Court will not disturb the jury's calculation of the damages simply because of the disparity between

---

[4] In stating that the Court violated its constitutional rights by not instructing the jury to consider a variety of other factors – e.g., the amount of the attorneys' fees the Plaintiff could recover, the profitability of the wrongful conduct to the Defendant, and the existence of other civil awards against the Defendant for the same conduct – the Defendant misreads the Supreme Court's decisions regarding the necessary restraints on jury awards of punitive damages. Although the Supreme Court has referred to these factors, it has done so only to describe the procedures for post-verdict review of punitive damage awards under Alabama law, not as part of a list of constitutionally-required jury instructions. *See Haslip*, 499 U.S. at 21-2.

the compensatory and punitive awards: in upholding a damage award despite a ratio of punitive to compensatory damages of over five hundred to one, Justice Stevens confirmed that the existence of such a disparity does not control the question of whether a punitive damage award violates due process, particularly where the jury's award appears otherwise justifiable, *TXO Production Corp.*, 113 S. Ct. at 2721-22.

II. DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT AND APPLY THE DAMAGES CAP UNDER TITLE VII OF THE CIVIL RIGHTS ACT

In a separate motion, the Defendant has asked the Court to reduce the verdict to $300,000, the maximum amount of compensatory and punitive damages allowed under Title VII for defendants employing more than 500 people. *See* 42 U.S.C.A. § 1981a(b)(3)(D) (West 1994). The Defendant seeks to apply this damages cap despite the fact that the Plaintiff brought her workplace discrimination, harassment, and constructive discharge claims under both the HRA (which places no limits on damages) and Title VII: according to the Defendant, plaintiffs should not be allowed to use Title VII as a tool for gaining access to a federal forum only to assert state claims based on the same alleged acts of discrimination in order to avoid Title VII's damages cap. Under the Defendant's theory, the Plaintiff thus waived her right to pursue unlimited damages under the HRA when she chose to bring her HRA and Title VII claims in federal court.

The Court does not believe that the Title VII damages cap should apply to the jury's verdict in this case. To

begin with, the Court has subject matter jurisdiction over this matter on the basis of either the presence of a federal question, (*see* Compl. ¶ 4; 28 U.S.C.A. § 1331 (West 1993)), or the parties' diversity of citizenship, (*see* Compl. ¶ 5; 28 U.S.C.A. § 1332(a) (West 1993)); this case thus does not implicate the Defendant's fear that a plaintiff could use Title VII as a mere jurisdictional device for the litigation of more generous state law claims in federal court. In any event, the Court does not accept the notion that Title VII limits the ability of victims of employment discrimination to recover under state statutes for conduct that creates a basis for liability under both federal and state law. *See Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1178 n.5 (S.D.N.Y. 1992). Prior to 1991, the fact that Title VII did not allow for recovery of *any* damages did not prevent courts from awarding damages in cases brought under both state statutes and Title VII, *see, e.g., Farmer Bros.*, 31 F.3d at 902-4; *Kientzy*, 990 F.2d at 1054; it seems illogical to suggest that, by expanding the remedies available under Title VII to include damages, the 1991 amendments actually reduced the amount of damages plaintiffs proceeding pursuant to both federal and state employment discrimination statutes can receive in federal court.

III. PLAINTIFF'S MOTION FOR AN AWARD OF BACK PAY

In response to the Plaintiff's request for a small award of back pay, the Defendant points out that the Plaintiff eventually found a job with a higher salary than that she received from the Defendant; according to the Defendant, the Plaintiff thus suffered no financial loss as

a result of her constructive discharge, and should not receive an award of back pay. However, but for the Defendant's discriminatory constructive discharge of her, the Plaintiff presumably could have remained in her position with the Defendant during the period in which she was unemployed *and* later accepted the higher-paying job; the Court thus believes it proper to award her back pay for this period of unemployment despite the subsequent increase in her salary. The rule suggested by the Defendant runs counter to Title VII's ultimate goal of providing "make whole" relief for victims of employment discrimination, *see Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975): reducing back pay awards whenever such victims eventually succeed in obtaining a higher-paying job would ignore the hardships faced by individuals during periods of unemployment, discourage the mitigation of losses by plaintiffs, and provide a windfall for employers lucky enough to have discriminated against an employee who later finds a better job, *see Sims v. Mme. Paulette Dry Cleaners*, 638 F. Supp. 224, 230 (S.D.N.Y. 1986). Indeed, most judges have agreed with the Court that, while a plaintiff's entry into a higher-paying job marks the end of the interim period upon which the back pay calculation should be based, a plaintiff's increased earnings in a subsequent job should not reduce the size of a damage award. *See, e.g., Matthews v. A-1, Inc.*, 748 F.2d 975, 978-79 (5th Cir. 1984); *Sims*, 638 F. Supp. at 230.

As the joint stipulation submitted by the parties indicates, the Plaintiff would have received $8,672 in salary and $480 in health care benefits had she remained in the Defendant's employ from the date of her constructive discharge until June 22, 1992, the date she began her new

full-time job; the Plaintiff received $484 in unemployment compensation during this period, bringing the total amount of the back pay award to $8,668 plus pre-judgment interest from June 22, 1992 until the date on which the Defendant makes payment. (*See* Pl.'s Mot. for an Award of Back Pay, Ex. 1.) Although the Plaintiff also received some payment for freelance work during her period of unemployment, the Plaintiff demonstrated at trial that she would have performed this work even if she had continued to work for the Defendant; these freelance earnings therefore do not diminish the size of the back pay award.

For these reasons, the Court will issue an Order denying the Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial or Remittitur, denying the Defendant's Motion to Alter or Amend Judgment and Apply the Damages Cap Under Title VII of the Civil Rights Act, and granting the Plaintiff's Motion for an Award of Back Pay.

/s/ William B. Bryant
William B. Bryant
Senior United States District Judge

Date: August 17, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIE BERMAN, Plaintiff, v. THE WASHINGTON TIMES CORPORATION, Defendant.	C.A. No. 92-2738 (WBB)

ORDER
(Filed Aug. 17, 1995)

For the reasons set forth in the Memorandum discussing the parties' post-trial motions, it is this 17th day of August, 1995 hereby

ORDERED that the Defendant's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial or Remittitur is DENIED; and it is

FURTHER ORDERED that the Defendant's Motion to Alter or Amend Judgment and Apply the Damages Cap Under Title VII of the Civil Rights Act is DENIED; and it is

FURTHER ORDERED that the Plaintiff's Motion for an Award of Back Pay is GRANTED; and it is

FURTHER ORDERED that back pay in this action is hereby AWARDED in favor of Plaintiff Julie Berman, and against Defendant The Washington Times Corporation, in the amount of $8,668, plus interest at the rate set forth in

D.C. Code § 28-3302(c) from June 22, 1992 until paid in full.

/s/ William B. Bryant
William B. Bryant
Senior United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7224 **September Term, 1996**
92cv02738

Julie Berman,

Appellee

v.

The Washington Times Corporation,

Appellant

BEFORE: Ginsburg, Sentelle and Tatel, Circuit Judges

ORDER
(Filed Sep. 6, 1996)

Upon consideration of appellant's petition for rehearing filed August 21, 1996, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7224 **September Term, 1996**
92cv02738

Julie Berman,

Appellee

v.

The Washington Times Corporation,

Appellant

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER
(Filed Sep. 6, 1996)

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

FILED
NOV 14 1996
OFFICE OF THE CLERK

(2)

No. 96-588

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE WASHINGTON TIMES CORPORATION,
Petitioner,

v.

JULIE BERMAN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN M. BREDEHOFT *
ELAINE C. BREDEHOFT
CHARLSON & BREDEHOFT, P.C.
11260 Roger Bacon Drive
Reston, Virginia 20190
(703) 318-6800
Counsel for Respondent
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR DENYING THE WRIT	4
I. THE COURT OF APPEALS APPLIED SETTLED LAW IN AFFIRMING THE DETERMINATION OF THE TRIAL JUDGE THAT PLAINTIFF'S CLOSING ARGUMENT WAS NO WARRANT FOR A NEW TRIAL	4
II. THE COURT OF APPEALS PROPERLY DECIDED, AS A MATTER OF LOCAL LAW, THAT THE TIMES WAS NOT ENTITLED TO A NEW TRIAL UNDER A STANDARD OF PROOF WHICH THE TIMES DID NOT PROPOSE AT TRIAL	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
Allstate Insur. Co. v. James, 845 F.2d 315 (11th Cir. 1988)	5
American Trucking Assns. Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990)	15
Ayoub v. Spencer, 550 F.2d 164 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977)	5
BMW of North America, Inc. v. Gore, 116 S.Ct. 1589, 64 U.S.L.W. 4335 (1996)	4
Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)	15
Cooper v. Firestone Tire & Rubber Co., 945 F.2d 1103 (9th Cir. 1991)	12
Doe v. Johnson, 52 F.3d 1148 (7th Cir. 1995)	8
Dyer v. Bergman & Associates, 657 A.2d 1132 (D.C. 1995)	14
Jonathan Woodner Co. v. Breeden, 665 A.2d 929 (D.C. 1995)	14
Kowalchuk v. United States, 176 F.2d 873 (6th Cir. 1949)	8
Martin v. Cavalier Hotel Corp., 48 F.3d 1343 (4th Cir. 1995)	11
McCrary-El v. Shaw, 992 F.2d 802 (8th Cir. 1993)	8
Mendes v. Johnson, 389 A.2d 781 (D.C. 1978)	15
Mosser v. Fruehauf Corp., 940 F.2d 77 (4th Cir. 1991)	11
New York Central R.R. Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929)	9
Niehus v. Liberio, 973 F.2d 526 (7th Cir. 1992)	8
Owens-Illinois Corp. v. Zenobia, 315 Md. 420, 601 A.2d 633 (1992)	13
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)	13
Pappas v. Middle Earth Condominium Ass'n, 963 F.2d 534 (2d Cir. 1992)	5
Polansky v. CNA Insur. Co., 852 F.2d 626 (1st Cir. 1988)	5
Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)	11

TABLE OF AUTHORITIES—Continued

	Page
Smith v. National R.R. Passenger Corp., 856 F.2d 467 (2d Cir. 1988)	12
United States v. St. Michael's Credit Union, 880 F.2d 579 (1st Cir. 1989)	8
Valbert v. Pass, 866 F.2d 237 (7th Cir. 1989)	12
Other Authorities	
3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions, Civil* (4th Ed. 1987) § 72.16	8
2 C. Wright, *Federal Practice & Procedure* § 489 (1982)	8
42 U.S.C. § 1981a	12
D.C. Code §§ 1-2501 *et seq.*	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-588

THE WASHINGTON TIMES CORPORATION,
Petitioner,

v

JULIE BERMAN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Julie Berman, the prevailing plaintiff below, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the unpublished per curiam decision of the United States Court of Appeals for the District of Columbia Circuit.

As the unanimous panel disposition by the Court of Appeals makes plain, this case involves nothing more than a straightforward application of settled law to the particular facts at issue. Ms. Berman, formerly a senior graphics designer for The Times, alleged that she had

been discriminated against on the basis of her gender, largely but not exclusively by a supervisory employee, Donald Garlock, who had repeatedly stated to other employees that "he believed that the woman's place was at home raising children." [1]

Shortly after Mr. Garlock arrived in Ms. Berman's department, corporate promotions, in November of 1990, he reduced Ms. Berman to tears—boasting of the fact to Ms. Berman's co-workers, and then posting a sign saying "crybabies will be shot on sight." [2] Mr. Garlock suspended Ms. Berman without warning and without cause. Mr. Garlock took away hundreds of Ms. Berman's creative job assignments—Ms. Berman was the "Senior Designer" when Mr. Garlock arrived—and gave them to his male subordinates. Ms. Berman was reduced to cut-and-paste work, photocopying, and cleaning supplies. For each of

---

[1] Stacey Chodash, a former female subordinate of Mr. Garlock, was one of those who testified to a number of similar comments. Ms. Chodash eventually resigned from The Times due to Mr. Garlock's gender-based abuse of her (and told human resources the reason). By happenstance, Ms. Chodash later met Regan Davis, another female former subordinate of Mr. Garlock, who testified at trial that Ms. Chodash's experiences "were so similar to mine, it was just uncanny." In the fall of 1990, immediately before Mr. Garlock was assigned to supervise Ms. Berman and other women in the corporate promotions department, Ms. Davis had a discussion with Roger Ott, Mr. Garlock's superior. According to Ms. Davis' testimony, Mr. Ott told Ms. Davis that "he was aware of the situation with Don [Garlock] but he said not to worry, that there weren't going to have any other women work under him." "[H]e said that he was aware of the situation and that no other women were going to work under Don" Garlock.

[2] Mr. Garlock told a co-worker of Ms. Berman that in an earlier supervisory position at The Times, "there was an occasion where he had made a female employee cry. He said that he made her cry and he smiled when he said this and he said, I hate crybabies." In January 1991, Mr. Garlock discussed Ms. Berman with this co-worker, saying "I had a little talk with her and I think she understands me now. I made her shake and I made her cry and I think that she understands me now."

these elements, the jury was presented with substantial evidence that male employees were treated differently.

Ms. Berman complained of Mr. Garlock's discrimination four times to human resources, and on other occasions to Mr. Garlock's supervisor, Peter Pitts. Ms. Berman finally filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission. Other female subordinates of Mr. Garlock also complained to Mr. Pitts and to The Times' human resources director. The Times took no action: Tracy Hoff, director of The Times' human resources department, asked Ms. Berman only if Mr. Pitts could "control" Mr. Garlock, which she knew he could not.[3] No trace of any of these complaints—much less of earlier documents prepared by human resources indicating that Mr. Garlock's abuse had forced another female employee to resign—were to be found in Mr. Garlock's personnel file, and no discipline was ever imposed against Mr. Garlock.

After more than a year of this abuse, Ms. Berman was called in to meet with Ms. Hoff and Mr. Pitts. After Mr. Pitts confirmed to Ms. Berman, "It doesn't matter. It's your word against ours," Ms. Berman quit. The properly-instructed jury found that Ms. Berman's working conditions were made intolerable by this conduct, and that she was forced to resign.

---

[3] While Ms. Hoff repeatedly asked Ms. Berman whether Peter Pitts could "control" Garlock, it was clear Mr. Pitts was not the one to do so. Mr. Pitts called another female employee a "cu*t" (and, at trial, lied under oath about it—according to witnesses offered by The Times). Mr. Pitts told Ms. Hoff herself to "f**k off." After the latter incident, Ms. Hoff sent a memorandum to Mr. Pitts noting his "vulgar," "condescending and patronizing" conduct, and warning that "[i]t would be difficult for me to support your decision on a disciplinary matter when one of your employees complains that you are too . . . shall we say 'brash.'" Of course, Ms. Hoff did testify in support of Mr. Pitts' decisions, after executing an agreement in which she promised to testify for The Times in exchange for a substantial cash payment.

The case was tried over a four-week period, with several interruptions, by Senior Judge William B. Bryant, a highly experienced trial judge. The jury deliberated over a period of days and returned a mixed verdict: finding for The Times on Ms. Berman's claim of hostile environment sexual harassment, but in favor of Ms. Berman on her claims of gender-based discrimination, constructive discharge, and retaliation. The jury assessed modest compensatory damages of $47,185, and a more substantial punitive damages verdict in excess of $700,000.[4] The Times noted an appeal to the Court of Appeals for the District of Columbia Circuit, which affirmed in a unanimous, unpublished, per curiam determination.[5] The Times' petition for rehearing and suggestion for rehearing en banc were denied.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED SETTLED LAW IN AFFIRMING THE DETERMINATION OF THE TRIAL JUDGE THAT PLAINTIFF'S CLOSING ARGUMENT WAS NO WARRANT FOR A NEW TRIAL

The Court of Appeals, noting that "the district judge carefully instructed the jury that statements of counsel

---

[4] The amount of the punitive damages verdict is the only factor which removes this case from the ordinary run of discrimination claims. The Times' petition for certiorari, however, does not challenge the amount of the punitive damages award.

[5] The Court of Appeals, noting that during the pendency of the appeal this Court had decided *BMW of North America, Inc. v. Gore*, 116 S.Ct. 1589, 64 U.S.L.W. 4335 (1996), ordered a limited remand. The Court of Appeals noted the "three guideposts" set out by this Court in *Gore*; held that the appellate court was "as well situated as the district court to perform the comparisons called for by the second and third of these guideposts," and remanded the punitive damages award for a determination of the first factor, "namely, the reprehensibility of the defendant's conduct." App. at 13-14. The Times does not petiiton for certiorari to review this aspect of the decision of the Court of Appeals.

are not evidence, and . . . admonished the jurors to make their decision based upon the evidence and not upon their passions or sympathies," found nothing—"after consideration of the record as a whole"—to suggest that the trial judge abused his discretion in denying The Times' motion for a new trial. App. at 10. In so holding, the Court of Appeals was plainly correct.[6]

Essentially all of the isolated selections of closing argument of which The Times complains related to missing documents: documents respecting which there was testimony during trial but which were not introduced into evidence by The Times. Among the missing documents to which Ms. Berman's counsel referred in closing were (i) the notes of an "exit interview" given to The Times' human resources department, in which a female subordinate of Ms. Berman's abusive supervisor placed The Times on notice of the supervisor's inability to work with women;[7] (ii) notes taken by Tracy Hoff, The Times' di-

---

[6] Despite The Times' attempt to inflate its argument into a conflict between the Circuits, nothing the Court of Appeals did in this case applied any different standard than the one used in the four cases cited by The Times. In each of those cases, the Courts of Appeals applied settled law to determine whether, on the facts of the particular case, a new trial was warranted. *See Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992); *Polansky v. CNA Insur. Co.*, 852 F.2d 626, 628 (1st Cir. 1988); *Allstate Insur. Co. v. James*, 845 F.2d 315, 319-20 (11th Cir. 1988); *Ayoub v. Spencer*, 550 F.2d 164, 170 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977). The Court of Appeals did the same thing in this case.

Moreover, the conduct in each of the four cases upon which The Times relies was decidedly improper; nothing similar happened in this case. For example, in *Polansky*, *supra*, counsel repeatedly argued his own personal opinions and the issue of insurance. In *Pappas*, *supra*, the closing argument was intended to inflame the Vermont jury against "outsiders" from New Jersey.

[7] Ms. Stacey Chodash, who worked for Donald Garlock in late 1988 and early 1989, testified at trial. Ms. Chodash was hired as a "graphic artist," the same position Ms. Berman held. Mr. Garlock told Ms. Chodash that "he believed that the woman's place was at

rector of human resources, when Ms. Berman complained to her of discrimination on multiple occasions in 1991,[8]

---

home raising children," and referred to women as "bitches." "[H]e said to me . . . he believed women, it was their duty to stay home, it was not their place to be in the work force, they didn't belong there." Ms. Chodash encountered the same types of abuse to which Ms. Berman testified. Mr. Garlock "would just look at me and he would say, 'um-um-um, you look good today.' " "He just stared. He wouldn't stop. It wasn't like a casual look at me. It wasn't a glance." On "several occasions" Mr. Garlock placed his hand on Ms. Chodash's knee and thigh, making her uncomfortable and forcing her to leave the room. Ms. Chodash was given "work for a graphic artist to do" only "[v]ery infrequently," and that work "was simple paste-up." Mr. Garlock's male subordinate "was doing all the graphic work for the department."

Ms. Chodash decided, after five months of this abuse, to resign. Ms. Chodash arranged a formal exit interview. Immediately before the exit interview she encountered another Times employee (the son of the CEO of The Times) who asked Ms. Chodash why she was leaving. "I told him because Don Garlock had been sexually harassing me." "He said, 'Stacey, I would not say that at your exit interview.' " Ms. Chodash did, however, tell the truth at her exit interview. "I told her about my experiences at The Times from the very day I started up till that date." Ms. Chodash told The Times personnel department "everything that [she] told this jury today." Liz Sommers from The Times' personnel department "wrote everything down." These notes were not produced in discovery, and were not intorduced into evidence by The Times.

[8] Ms. Berman complained to Tracy Hoff of The Times' human resources department at least four times about the abusive conduct of Mr. Garlock. Ms. Hoff, by her own admission, took no action—and lied to Ms. Berman by telling her that there had never been a problem with Mr. Garlock before. Ms. Hoff herself had "investigated" Ms. Chodash's complaint against Mr. Garlock, concluding that Ms. Chodash had lied without ever speaking to her.

After testifying for The Times on direct examination, in great detail, as to each of several meetings with Ms. Berman in 1991 and 1992, Ms. Hoff admitted to her deposition testimony that she could not even remember how many times she met with Ms. Berman in 1991, much less what was said at any one of the meetings. Ms. Hoff was also thoroughly impeached by her "settlement" with The Times: a $28,000 payment made between the first and second sessions of her deposition, in exchange for her promise to testify,

and (iii) documents underlying summary charts generated by The Times during the course of the litigation, purporting to show Ms. Berman's job assignments.[9]

The Times objected to some, but not all, of these references during Ms. Berman's closing argument and rebuttal.[10] As articulated by The Times' counsel, the basis for objection was that it is "improper . . . to comment on evidence that are [*sic*] absent, on documents that were not introduced. That's improper. It's like commenting on a witness who doesn't testify." [11] In this, The Times was partly correct: commenting on evidence which has not been introduced, in a civil trial, is similar to commenting on a witness within the control of a party who does not appear. However, it is black letter law that both forms

---

after which her memory "improved" markedly. The jury would have been justified in disbelieving everything Ms. Hoff testified to on the stand.

[9] Mr. Peter Pitts was Mr. Garlock's supervisor at The Times. Mr. Pitts testified at great length as to the work status reports and summary charts submitted by The Times (and was, indeed, the only defense witness on those exhibits). However, Mr. Pitts testified that he saw the summary charts for the first time on the stand —and yet swore under oath that charts the accurately summarized tens of thousands of entires on the status reports, an inherently incredible statement. Mr. Pitts testified he had no idea who prepared the charts and, in at least one case, had no idea what the chart's "scale" meant.

[10] The same form of argument was made repeatedly by Ms. Berman, without drawing an objection from The Times. Indeed, Ms. Berman's rebuttal closed with the observation, "Now, I would say compare these notes to Stacey Chodash's exit interview but we can't. In the words of my four-year-old, poof, they are gone." The Times chose not to object to this or to more than a dozen other references to missing documents throughout Ms. Berman's closing. Failure to sustain The Times' objections, if it were error, would have been harmless, the same references having been made without objection.

[11] This colloquy between counsel and the Court, omitted from The Times' petition, was before the Court of Appeals as page 288 of the Joint Appendix.

of commentary are proper and appropriate. The issue is even the subject of a standard federal jury instruction:

> If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then [the jury] may infer that the evidence is unfavorable to the party who could have produced it and did not.

3 Devitt, Blackmar & Wolff, *Federal Jury Practice and Instructions, Civil* (4th Ed. 1987) § 72.16 (Failure to Produce Available Evidence).

There is a world of difference from arguing for a result based on material which has not been introduced as evidence (the situation in the cases cited by The Times in its petition), and arguing—as Ms. Berman did here—that the jury should draw an unfavorable inference from the fact The Times had possibly-probative documents which were not introduced.[12] Even where "[t]he record is barren as to what actually happened to [the evidence], . . . it is a permissible inference that if they were truly probative . . . then the [party] would have produced [it]." *Doe v. Johnson*, 52 F.3d 1148, 1161 (7th Cir. 1995).[13]

---

[12] The jury heard testimony, for example, that the notes of Ms. Chodash's exit interview were given to "counsel."

[13] This principle is well-settled and not open to serious dispute. *See, e.g., McCrary-El v. Shaw*, 992 F.2d 802, 812-13 (8th Cir. 1993) (error to require proof that documents were destroyed since party is "entitled to argue to the jury that [the opposing party] still had the [evidence] and was refusing to produce it because it was damaging to its case"); *Niehus v. Liberio*, 973 F.2d 526, 530 (7th Cir. 1992) (Posner, J.) (it "should be enough that the party could have produced the evidence and that he surely would have done so had the evidence been favorable to him"); *United States v. St. Michael's Credit Union*, 880 F.2d 579, 597 (1st Cir. 1989) ("the failure of a party to produce available evidence that may help decide an issue may justify an inference that the evidence would be unfavorable to the party to whom it is available or whom it would ordinarily be expected to favor"), *quoting* 2 C. Wright, *Federal Practice & Procedure* § 489 (1982); *Kowalchuk v. United States*, 176 F.2d 878, 877 (6th Cir. 1949) (noting "the general rule is that

In sum, Senior Judge Bryant was correct when he told The Times' counsel during this colloquy that the documents referred to "don't have to be put in evidence," and the Court of Appeals was correct when it affirmed the trial court's denial of The Times' post-trial motions on this ground.

Even if the law were otherwise as to the particular examples of argument on which The Times relies, both the trial judge and the unanimous panel of the Court of Appeals properly determined that prompt curative instructions obviated the need for a new trial.[14] Immediately after Ms. Berman concluded her rebuttal, Senior Judge Bryant began the charge to the jury. Mere moments after the comment in rebuttal respecting Mr. Martin's investigatory style [15] (*i.e.*, less than two pages of transcript later) Senior Judge Bryant instructed the jury:

---

failure to produce available evidence which would help decide the issue raises the inference that such evidence would be unfavorable to that party if produced").

[14] This case is nothing at all like *New York Central R.R. Co. v. Johnson*, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929), the sole authority from this Court upon which The Times relies—although, tellingly, a case which was neither discussed nor even cited by The Times in any of its three briefs to the Court of Appeals. The issue of curative instructions was not even raised in *Johnson*, where this Court faulted the "failure of the trial judge . . . to make certain that the jury would disregard" improper argument. 279 U.S. at 318, 49 S.Ct. at 303.

[15] John Martin, corporate counsel of The Times, was one person charged by The Times with addressing Ms. Berman's charge of discrimination. Mr. Martin called Ms. Berman into his office after receiving the charge from the EEOC, but did not ask Ms. Berman for any of the specifics of her complaint. Mr. Martin also testified that he did not interview Ms. Berman with respect to her claims of abusive treatment or unfavorable work assignments, and did not interview any of the women who were supervised by Don Garlock. Mr. Martin testified that Mr. Garlock's "crybabies will be shot on sight" sign was not "offensive." In responding to the EEOC request for information, Mr. Martin testified that he did not produce a copy of Ms. Chodash's exit interview and did not produce a copy of

> You are the sole and exclusive judges of the facts. You alone determine the weight, the effect, and the value of the evidence and the credibility of the witnesses. You should determine the facts without prejudice, without fear or favor, solely from a fair consideration of the evidence in the case. . . . You are the sole and exclusive judges of the facts.

Senior Judge Bryant then continued:

> The actions of the Court during the trial in ruling on motions or objections by counsel or in comments to counsel or in questions to witnesses or in setting forth the law in these instructions are not to be taken by you as any indication of the Court's opinion as to how you, the jury, should determine the issues of fact. If as a matter of fact the Court has expressed or intimated in any fashion any opinion as to the facts you are not bound by that opinion because what the verdict shall be in this case is your sole and exclusive duty and responsibility.
>
> * * * *
>
> You must weigh and consider this case without regard to sympathy, prejudice, passion for or against any party in the case.
>
> * * * *
>
> [Y]ou may consider only the evidence properly admitted in the case[. E]vidence includes the sworn testimony of witnesses, the exhibits which have been admitted into evidence in the course of the trial, and the facts stipulated to by counsel.
>
> * * * *

---

the notes taken by Ms. Hoff in her January and March 1991 meetings with Ms. Berman. All in all, counsel's argument that Mr. Martin performed an inappropriate investigation was precisely what the district court found it to be: "nothing more than passionate advocacy." App. at 24. This rhetorical flourish was hardly what The Times calls it, "an accusation of grossly immoral conduct." Petition at 10.

> I should reiterate and re-emphasize what isn't evidence. The statements of counsel are not evidence and should not be considered as evidence . . . . I told you at the outset of the trial that . . . after all the evidence was in you would be exposed to the closing arguments and closing statements of counsel and at that time I believe I told you or cautioned you that those statements were not evidence.[16]
>
> * * * *
>
> At the close of the case counsel are allowed to make a closing argument. . . . [T]he statements of counsel do not constitute evidence in themself.
>
> * * * *
>
> Evidence was presented primarily through witnesses who take the witness stand and testify. You as jurors must consider and weigh the testimony of all the witnesses who have appeared before you.

It is well-settled that the jury is presumed to have followed these instructions. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). These "prompt instructions obviated any prejudice," even assuming any improper remark had been made.[17]

Finally, in the context of a trial which extended, with some interruption, from the first week in February through the first week in March 1995, the brief remarks isolated by The Times are insubstantial.[18] Even if the argument

---

[16] At the beginning of trial, immediately after the jury had been selected, Senior Judge Bryant instructed the jury, "In the first place, I want to caution you that remarks of counsel, either opening statements or their closing remarks, are not evidence. Evidence comes from the witness stand."

[17] *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343 (4th Cir. 1995) (comments respecting supervisor having a sexually transmitted disease; any prejudice obviated by general curative instructions). *See Mosser v. Fruehauf Corp.*, 940 F.2d 77, 82 (4th Cir. 1991) (curative instructions obviate any possibility of prejudice).

[18] The transcript of plaintiff's closing argument itself is about forty pages long; The Times' closing argument consumed more than forty pages of transcript.

had been improper, and even if no curative instruction at all had been given, the trial judge and the Court of Appeals each correctly determined that "these statements clearly did not so permeate the closing argument or the Plaintiff's presentation during the three weeks of trial that they could have prejudiced the jury or affected the verdict." [19]

II. THE COURT OF APPEALS PROPERLY DECIDED AS A MATTER OF LOCAL LAW, THAT THE TIMES WAS NOT ENTITLED TO A NEW TRIAL UNDER A STANDARD OF PROOF WHICH THE TIMES DID NOT PROPOSE AT TRIAL

The Court of Appeals properly rejected The Times' assertion, raised for the first time on appeal, that part (but not all) of Ms. Berman's claim for punitive damages should have been decided under a "clear and convincing evidence" standard.[20] Since The Times did not request that the jury be instructed on this standard, and

---

[19] August 17, 1995 Memorandum Opinion of Senior Judge Bryant, App. at 25. *See* App. at 10, July 22, 1996 Memorandum Opinion of Court of Appeals ("in consideration of the record as a whole," no abuse of discretion in denying motion for new trial based on closing argument). *See generally Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 472 (2d Cir. 1988) (two paragraphs of objectionable material in over fifty pages of argument does not warrant reversal). *See also Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1107 (9th Cir. 1991); *Valbert v. Pass*, 866 F.2d 237, 242 (7th Cir. 1989).

[20] This argument relates solely to the recovery of punitive damages in excess of $300,000. Punitive damages of up to $300,000 are recoverable under Title VII of the Civil Rights Act, as amended in 1991, 42 U.S.C. § 1981a, and there is no claim that a "clear and convincing evidence" standard applies to that recovery. In addition, since the District of Columbia courts have uniformly held that the D.C. Human Rights Act, D.C. Code §§ 1-2501 *et seq.*, should be construed in conformity with Title VII, it is not at all clear that the District of Columbia courts would require "clear and convincing evidence" for the recovery of punitive damages under that statute. This is a thicket of local law which this Court need not, and should not, enter.

since The Times did not object to the use of a "preponderance of the evidence" standard in actually instructing the jury, Fed. R. Civ. P. 51 provides a complete and commonplace answer to The Times' petition: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds for the objection." There is no question but that The Times failed to comply with Rule 51, and did not even raise this issue in the trial court on post-trial motions.[21]

Moreover, The Times' failure to request a "clear and convincing evidence" instruction is not explicable on the grounds that it was surprised by a subsequent change in the law of the District of Columbia. As early as 1991, this Court signaled that there is "much to be said in favor of" a clear and convincing evidence standard for punitive damages, noting that many states already required such.[22] Maryland, generally the source of the common law of the District of Columbia, adopted a clear and convincing evidence standard of proof for punitive damage awards in 1992.[23] Even the D.C. Court of Appeals signaled that it might require clear and convincing evidence for punitive damage awards, some four months before the trial judge in this case decided The Times'

---

[21] Again, The Times seeks to manufacture a "split" among the circuits by pointing to other courts which have decided analogous, but not identical, issues in a different way. What The Times' petition ignores, however, is that in this case the issue of retroactivity is one of *local District of Columbia law*. It is entirely permissible for different federal Circuits to apply the differing laws of the differing states and jurisdictions to reach different results. These questions of local law are particularly ill-suited for resolution by writ of certiorari.

[22] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23 n.11, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

[23] *Owens-Illinois Corp. v. Zenobia*, 315 Md. 420, 601 A.2d 633 (1992).

post-trial motions.[24] There is nothing unforeseeable about this change in the law; if The Times wanted the jury instructed on a clear and convincing evidence standard in this case, its failure to request that instruction is inexplicable and dispositive.

In sum, as the Court of Appeals correctly noted in Ms. Berman's case, the issue of whether punitive damages under District of Columbia law must be proved by clear and convincing evidence "was still open and undecided at the time of the trial in this case; therefore, the supervening authority doctrine does not apply." App. at 9. This determination is entirely consistent with the manner in which the local District of Columbia courts have handled the issue. In *Dyer v. Bergman & Associates*, 657 A.2d 1132 (D.C. 1995), the D.C. Court of Appeals noted that the standard of proof for punitive damages was still unresolved, yet declined to resolve the issue because the defendant in that case, like The Times here, had not requested use of a "clear and convincing evidence" standard at trial.

The issue under local District of Columbia law of the retroactive application of the change in the burden of proof for punitive damages is fairly clear. Nothing in the case which announced the principle, *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929 (D.C. 1995), suggests in the slightest that the new standard of proof should be applied retroactively, much less to cases pending on appeal at the time of the *Breeden* decision. Under District of Columbia law, several "specific criteria" are used to determine the application of a new rule of law to pending cases: (i) the extent of reliance on the old rule and the hardship to litigants if the new rule were to be applied; (ii) avoidance of altering vested property rights;

---

[24] *Dyer v. Bergman & Associates*, 657 A.2d 1132 (D.C. 1995). *Dyer* was argued to the D.C. Court of Appeals some six months before the jury in Ms. Berman's case was instructed.

(iii) the desire to award plaintiffs who seek to "initiate just changes in the law"; and (iv) the "fear of burdening the administration of justice by disturbing decisions reached" under earlier precedent. *Mendes v. Johnson*, 389 A.2d 781, 789 (D.C. 1978). In this case, each of these four factors counsels against disturbing the settled verdict in favor of Mr. Berman; in particular, the burden on the judicial system "has assumed great importance," and under District of Columbia law "[c]ourts are acutely aware of the potential impact on the judicial system that retrospective application of such decisions, *requiring relitigation of cases already decided* under prior rules, would have and, consequently, have been reluctant to disturb settled cases." *Mendes, supra*, 389 A.2d at 791 (emphasis added).

The new iteration of the evidentiary burden of a plaintiff under D.C. law can have no application to this case. The question of whether the local courts of the District of Columbia will determine that heightened burden to apply retroactively, or in cases of this sort, is not one which should occupy the time of this Court.[25]

---

[25] This Court has refused repeatedly to apply new rules retroactively in civil cases. *See generally Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); *American Trucking Assns. Inc. v. Smith*, 496 U.S. 167, 188-200, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990) (O'Connor, J., concurring).

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

JOHN M. BREDEHOFT *
ELAINE C. BREDEHOFT
CHARLSON & BREDEHOFT, P.C.
11260 Roger Bacon Drive
Reston, Virginia 20190
(703) 318-6800
Counsel for Respondent

November 14, 1996

* Counsel of Record